A

# RHB BANK

v.

# L & R HOLDINGS SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
JEFFREY TAN JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: W-02-382-2005]

C

28 JANUARY 2010

***CIVIL PROCEDURE:*** *Injunction - Appeal against - Injunction restraining defendant bank from enforcing securities pledged by plaintiffs to it - Whether there was bona fide serious issue to be tried - Balance of*

D

*convenience - Whether greater injustice would be done by granting injunction*

This was an appeal by the defendant bank against the High Court judge's order restraining the defendant from enforcing securities

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pledged by the plaintiffs to the defendant. The 1st plaintiff was the defendant's customer while the 2nd plaintiff was the guarantor of the 1st plaintiff's account. The 1st plaintiff had accepted from the defendant a credit facility of RM5 million, which was later increased, with the attendant provision of additional securities.

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Those were the securities, worth around RM67 million, that the order restrained the defendant from enforcing. The outstanding sum stood at RM18,346,546 at the material time and was incurred as a result of 105 telegraphic transfers together with the interest. The plaintiffs contended that the defendant had breached the

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customer mandate, in that the defendant had acted on forged applications for telegraphic transfers and authorised the 105 telegraphic transfers to companies or individuals unrelated to the 1st plaintiff. The defendant, on the other hand, denied all forgery on its part. The issue requiring consideration was whether the

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injunction ought to have been granted.

**Held (allowing the appeal, and setting aside the injunction) Per Jeffrey Tan JCA delivering the judgment of the court:**

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**(1)** In one way or another, the alleged breach of mandate would be tried. However, an issue is not *bona fide* and serious just because it will be tried. The issue must be both *bona fide* and serious in the first place. In the present case, the impugned

telegraphic transfers spanned almost two years (23 January 2001 to 28 December 2002), during which the defendant had furnished banking statements to the 1st plaintiff. Those telegraphic transfers would have been disclosed in the banking statements. If the 1st plaintiff had vetted the banking statements, it should not seem possible that the "forged" telegraphic transfers could number 105 and/or span two years. Given that the 1st plaintiff only reported the matter of the forged telegraphic transfers to the police on 21 March 2003, the question arose as to whether the 1st plaintiff had exercised vigilance or been negligent, which brought the provisions of s. 73A Bills of Exchange Act 1949 into focus. (para 5)

**(2)** There should be no finding in this appeal on the merits of the claim or any defence to it. However, on the facts, it would not seem clear that there was a *bona fide* serious issue to be tried. In any case, the balance of convenience was not in favour of the grant of the injunction. The alleged damage was quantifiable. The defendant, being a bank, was obviously in a position to pay any damages that could be awarded to the plaintiffs. Conversely, it would appear that granting the injunction would strip the defendant of its security without any surety to the defendant that the damage caused by the injunction could be undone. Unquestionably, greater injustice would be done by the grant of the injunction, especially as the injunction was wider than the alleged interest it sought to protect, than by the refusal of it. The injunction should not have been granted. (para 6)

***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh defendan bank terhadap perintah hakim Mahkamah Tinggi menghalang defendan dari menguatkuasakan cagaran yang dijaminkan oleh plaintif-plaintif kepada defendan. Plaintif pertama adalah pelanggan defendan sementara plaintif kedua adalah penggerenti akaun plaintif pertama. Plaintif pertama telah menerima dari defendan suatu kemudahan kredit sebanyak RM5 juta, yang selepas itu dinaikkan, dengan diperuntukkan cagaran tambahan. Itulah cagaran, berjumlah kira-kira RM67 juta, yang perintah tersebut menghalang defendan dari menguatkuasakan. Jumlah yang belum dijelaskan adalah sebanyak RM18,346,546 pada masa yang material dan berlaku akibat dari 105 hantaran telegrafik bersama-sama faedah. Plaintif-plaintif menghujah bahawa defendan

telah melanggar mandat pelanggan, di mana defendan telah bertindak atas permohonan untuk hantaran telegrafik yang dipalsukan dan telah memberi kuasa bagi 105 hantaran telegrafik kepada syarikat atau individu yang tidak berkaitan dengan plaintif pertama. Defendan, walau bagaimanapun, menafikan kesemua pemalsuan pada pihaknya. Isu yang perlu ditimbang adalah sama ada injunksi tersebut seharusnya diberikan.

**Diputuskan (membenarkan rayuan, dan mengenepikan injunksi)**

**Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:**

**(1)** Dalam apa keadaan pun, pelanggaran mandat yang dikatakan akan dibicarakan. Walaupun begitu, suatu isu bukanlah *bona fide* dan serius hanya kerana ia akan dibicarakan. Isu tersebut mesti pertamanya kedua-dua *bona fide* dan serius. Dalam kes semasa, hantaran telegrafik yang disoalkan menjangkau hampir dua tahun (23 Januari 2001 kepada 28 Disember 2002), pada masa defendan telah menyediakan pernyataan-pernyataan perbankan kepada plaintif pertama. Hantaran telegrafik tersebut akan didedahkan di dalam pernyataan-pernyataan perbankan. Jika plaintif pertama telah memeriksa pernyataan-pernyataan perbankan, ia tidak sepatutnya terjadi bahawa hantaran teelegrafik yang "dipalsukan" boleh berjumlah sebanyak 105 dan/atau menjangkau dua tahun. Berdasarkan bahawa plaintif pertama hanya melaporkan perkara hantaran telegrafik yang dipalsukan kepada polis pada 21 Mac 2003, soalan tertimbul sama ada plaintif pertama telah mengambil langkah berjaga-jaga ataupun telah cuai, yang membawa peruntukan-peruntukan s. 73A Akta Bil Pertukaran 1949 dalam fokus.

**(2)** Dalam rayuan semasa, tidak sepatutnya ada apa-apa dapatan atas merit tuntutan atau apa-apa pembelaan terhadapnya. Walau bagaimanapun, berdasarkan fakta-fakta, ia tidak nampaknya jelas bahawa terdapat isu *bona fide* serius yang perlu dibicarakan. Apa jua pun, imbangan kesenangan bukan menyokong pemberian injunksi tersebut. Gantirugi yang dikatakan boleh dikira. Defendan, sebuah bank, jelasnya berada dalam kedudukan untuk membayar apa-apa gantirugi yang boleh diawardkan kepada plaintif-plaintif. Sebaliknya, ia nampaknya bahawa memberikan injunksi tersebut akan merampas cagaran defendan tanpa apa-apa jaminan kepada defendan bahawa gantirugi yang disebabkan oleh injunksi boleh

dibaiki. Memang tidak dipersoalkan lagi bahawa ketidakadilan yang lebih besar akan terjadi jika injunksi tersebut diberikan, terutamanya kerana injunksi lebih luas dari kepentingan yang dikatakan dilindunginya olehnya, dari menolaknya. Injunksi tersebut tidak seharusnya diberikan.

**Case(s) referred to:**
*American Cynamid Co v. Ethicon Ltd [1975] AC 396* ***(refd)***
*Herman Ando v. Tactland Development Sdn Bhd & Other Appeals [2009] 6 CLJ 448 CA* ***(refd)***
*Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA* ***(refd)***
*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC* ***(refd)***
*The New Straits Times Press (M) Bhd v. AirAsia Bhd [1986] 1 LNS 80 SC* ***(refd)***

**Legislation referred to:**
Bills of Exchange Act 1949, ss. 24, 73A
Rules of the Court of Appeal 1994, rr. 18(4)(d), 101

*For the appellant - Prem Ramachandran; M/s Kumar Partnership*
*For the respondent - Harpal Singh Grewal; M/s AJ Ariffin, Yeo & Harpal*

*Reported by Suresh Nathan*

## JUDGMENT

**Jeffrey Tan JCA:**

**[1]** This is an appeal by the defendant/appellant against the learned judge's order dated 10 March 2005. That order restrained the defendant from enforcing the securities pledged by the plaintiffs to the defendant, but was silent as to whether the injunction was interlocutory or permanent.

**[2]** The pertinent background facts were as follows. The defendant was a bank. The 1st plaintiff was a customer of the defendant. The 2nd plaintiff was the guarantor of the account of the 1st plaintiff. The bank and customer relationship commenced in 1996, with the acceptance by the 1st plaintiff of a credit facility of RM5 million from the defendant. That credit facility was later increased with the attendant provision of additional securities, which were (i) the guarantee of the 2nd plaintiff dated 9 July 2001, (ii) a charge over all fixed deposits and credit balances held

to the credit of the 1st plaintiff by the defendant dated 9 July 2001, (iii) an undated letter of set off allowing the defendant to apply all monies held to the credit of the 1st plaintiff by the defendant in satisfaction of all monies owed by the 1st plaintiff to the defendant, (iv) an undated memorandum of deposit of fixed deposits allowing the defendant to apply the fixed deposits held to the credit of the 1st plaintiff towards sums due from the 1st plaintiff to the defendant, (v) a debenture dated 9 July 2001 of the 1st plaintiff in favour of the defendant, providing a fixed and floating charge over all the assets of the 1st plaintiff, (vi) a 1st party charge of five commercial lots in Wisma Central, Kuala Lumpur, (vii) a 1st party charge of two industrial lots in the Mukin of Ijok, Kuala Selangor, (viii) a 3rd party charge of a housing lot in Cheras, Selangor, and, (ix) a 3rd party charge of a house in Cheras, Selangor, the plaintiffs. Those were the securities that the order restrained the defendant from enforcing.

**[3]** All parties agreed that those securities were worth in the region of RM67 million (see 230AR and p. 1 of the written submission of the appellant) while the outstanding sum stood at RM18,346,546 at the material time (see 230AR and p. 2 of the written submission of the appellant). That outstanding sum of RM18,346,546 was incurred as a result of 105 telegraphic transfers that amounted to RM4,254,687.51 together with the interest (see 230AR and p. 2 of the written submission of the appellant).

**[4]** The crux of the plaintiffs' claim against the defendant was that the defendant had breached the customer mandate, in that the defendant had acted on forged applications for telegraphic transfers and authorised the aforesaid 105 telegraphic transfers to companies or individuals unrelated to the 1st plaintiff. It was contended by the plaintiffs that one of the managers of the 1st plaintiff had forged the signatures of the authorised signatories on all applications for telegraphic transfers. Evidently, the claim against the defendant was not grounded on forgery by the defendant. In any event, the defendant denied all forgery on its part. The defendant contended that forgery, if any, was caused and or contributed by the plaintiffs. The defendant pointed to ss. 24 and 73A of the Bills of Exchange Act 1949. On the contrary, the plaintiffs argued that the defendant would have to prove those legal defences at the trial.

**[5]** It should also have been said that the claim would also have to be proved at the trial. But not all proof could be put on the back burner until the trial. In the application for the injunction, the plaintiff had to establish that there was a *bona fide* serious issue to be tried (*Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293) "and that the balance of convenience laid in favour of granting the injunction (see *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293") (*Herman Ando v. Tactland Development Sdn Bhd & Other Appeals* [2009] 6 CLJ 448 per Raus Sharif JCA, as he then was). Given that the sought injunction was issued, it could only be assumed that the court below must have held that there was a *bona fide* serious issue to be tried. But how true was it that there was a *bona fide* serious issue to be tried? In one way or another, the alleged breach of mandate would be tried. But an issue is not *bona fide* and serious just because it will be tried. The issue must be both *bona fide* and serious in the first place, which in the present case must be viewed from the angle of the following factors and the following law. In the present case, the impugned telegraphic transfers spanned for almost two years, from 23 January 2001 to 28 December 2002. During those two years, the defendant had furnished banking statements to the 1st plaintiff. Those telegraphic transfers would have been disclosed in the banking statements. Now, had those banking statements been at all vetted by the 1st plaintiff, it should not seem possible that those "forged" telegraphic transfers could come to 105 and/or could span two years. But given that the 1st plaintiff only reported the matter of forged telegraphic transfers to the police on 21 March 2003, it must be seriously asked as to whether the 1st plaintiff had exercised any vigilance or had been negligent, which brings into focus the provisions of s. 73A of the Bills of Exchange Act 1949, which provides:

> Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

**[6]** There should be no finding in this appeal on the merits of the claim or any defence to it (see *The New Straits Times Press (M) Bhd v. AirAsia Bhd* [1986] 1 LNS 80). But on the facts, it would not seem clear that there was a *bona fide* serious issue to be tried. Also, in any case, it would not seem that the balance of convenience was in favour of the grant of the injunction. "If damages in the measure recoverable at common law would be adequate remedy and the defendants would be in a financial position to them no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage" (*American Cyanamid Company v. Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 per Lord Diplock). The alleged damage was quantifiable. The defendant was a bank. The defendant was obviously in a position to pay whatever damages that could be awarded to the plaintiffs. Conversely, it would appear that the grant of the injunction would strip the defendant of its security without any surety to the defendant that the damage caused by the injunction could be undone. Unquestionably, greater injustice would be done by the grant of the injunction, especially so as the injunction was wider than the alleged interest that it sought to protect, than by the refusal of it. The injunction should not have been granted.

**[7]** For those reasons, we unanimously allow the appeal, set aside the injunction, and award costs of this appeal to the appellant.

**[8]** Incidentally, we had, at the onset of arguments, overruled the preliminary objection of the respondent that the sealed copy of the said order was filed without the leave of court, as such leave was not required. That was clearly said by Mohtar Abdullah FCJ in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645, after his Lordship had carefully traced and examined the following Rules and Practice Directions applicable to the Court of Appeal.

**[9]** Practice Direction 1 of 1992 reads as follows:

> Di bawah peruntukan Kaedah 62(4)(d) Kaedah-Kaedah Mahkamah Agung 1980, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu ke dalam rekod rayuan.

Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.

Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.

Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka. Pihak penentang sewajarnya diberitahu di atas penyerahan ini.

**[10]** In relation to a memorandum of appeal, r. 18(4) of the Rules of the Court of Appeal (RCA) requires an appellant to attach to such memorandum copies of the proceedings in the High Court, including:

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the judge's notes of the hearing of the cause or matter in which the decision appealed against was given;

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to r. 101 if such documents are not in the national language, copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

(e) a copy of the written judgment or grounds of decision of the judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing the record of appeal, provided that if the court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and

(f) a copy of the notice of appeal.

**[11]** Rule 18(4)(d) of the RCA required "a copy of the judgment, decree or order appealed from" to be attached to the memorandum of appeal. But that requirement of "a copy" was

allayed by Court of Appeal Practice Direction 1 of 1995, which adopted and modified Practice Direction 1 of 1992, which with the modifications reads as follows.

> Di bawah peruntukan Kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994, seseorang perayu adalah dikehendaki menyertai satu salinan penghakiman, dekri atau perintah yang dirayu ke dalam rekod rayuan.
>
> Sehubungan dengan itu didapati kebanyakan perayu tidak mematuhi peruntukan tersebut dan ini melambatkan penetapan kes-kes rayuan di Mahkamah Rayuan.
>
> Untuk menyegerakan prosiding rayuan di Mahkamah Rayuan, sebaik sahaja perayu menerima perintah termeterai dari Mahkamah Tinggi, perintah tersebut bolehlah difailkan sebagai rekod rayuan tambahan tanpa sebarang permohonan.
>
> Sebagai alternatif, perayu dibenar menyerahkan salinan penghakiman, dekri atau perintah yang dirayu pada hari perbicaraan rayuan di dalam mahkamah terbuka. Pihak penentang sewajarnya diberitahu di atas penyerahan ini.

**[12]** In the case of the documents specified in r. 18(4)(d) of the RCA, "there is clearly no necessity to make an application for leave to file the supplementary record of appeal" (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd (supra)* per Mohtar Abdullah FCJ). Leave is not required to file the documents specified in r. 18(4)(d) of the RCA. As an alternative to the filing of such a supplementary record of appeal, Court of Appeal Practice Direction 1 of 1995 allows an appellant "to submit a copy of the judgment, decree or order appealed against on the day of the appeal in open court. The only qualification is the professional ethical requirement of informing the respondent accordingly" (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd (supra)* per Mohtar Abdullah FCJ).

**[13]** Practice Direction 1 of 1992, in so far as it is applicable to the Court of Appeal, has since been cancelled by Court of Appeal Practice Direction 1 of 2008 which took effect on 1 August 2008. But Court of Appeal Practice Direction 1 of 1995 was untouched by Court of Appeal Practice Direction 1 of 2008, and hence is still in force.